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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DARRYL H., Petitioner, v. THE SUPERIOR COURT OF CONTRA COSTA COUNTY, Respondent; CONTRA COSTA COUNTY CHILDREN AND FAMILY SERVICES BUREAU, Real Party in Interest.	A109178 (Contra Costa County Super. Ct. No. J04-01767)

Darryl H., the biological father of a six-month-old girl, seeks writ review of the court order denying him reunification services and setting a permanency planning hearing. He argues that the court erred in not elevating his status to that of presumed father, in denying him reunification services, and in denying placement of his daughter with him. We must affirm the trial court decision to terminate or deny reunification services and set a hearing under Welfare and Institutions Code section 366.26[1] if the order is supported by substantial evidence. (*In re Shaundra L.* (1995) 33 Cal.App.4th 303, 316.)

[1] All further statutory references are to the Welfare and Institutions Code.

The child was born in September 2004. On September 27, Children and Family Services filed a petition under section 300, subdivision (b), alleging that the child's parents were unable to care for her due to the mother's mental illness, and under subdivision (f), alleging that the mother had caused the death of the child's half-sibling. The petition listed Darryl as the alleged father, and he was served with a copy of the petition. The child was ordered detained on September 28. The investigation narrative reveals that the mother is a patient at Napa State Hospital, and that she "has a history of infanticide," and "self-disclosed a history of mental illness, including infanticide." The mother told the social worker that Darryl was the father, and that he was "also hospitalized at Napa State Hospital for 'lighting a man on fire.' " The social worker's report also reveals that in 1990 the mother was found not guilty by reason of insanity of murder, and that in 2003 she was arrested for involuntary manslaughter. The mother waived reunification services.

A paternity test confirmed that Darryl is the child's biological father. Darryl was represented by counsel at the hearings that took place on October 1, when the paternity test was ordered; on October 15, when the court ordered that there be no visitation between him and his daughter; on October 29, when the mother waived reunification services; on November 30; and on December 21. On January 19, 2005, Darryl was also represented by counsel when the court scheduled a section 366.26 hearing for May 11, 2005. In mid-January Darryl was expected to be released from the hospital in approximately six to nine months.

A presumed father is entitled to reunification services. "[A] biological father is not entitled to custody under section 361.2, or reunification services under section 361.5 if he does not attain presumed father status prior to the termination of any reunification period, [but] he may move under section 388 for a hearing to reconsider the juvenile court's earlier rulings based on new evidence or changed circumstances." (*In re Zacharia D*. (1993) 6 Cal.4th 435, 454-455, fn. omitted.) "A natural father can become a presumed father if he receives the child into his home and openly holds out the child as his natural child." (*In re Andrew L.* (2004) 122 Cal.App.4th 178, 191.) " 'If an unwed

father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent.' [Citations.] The focus is on whether the natural father 'has done all that he could reasonably do under the circumstances' to demonstrate his commitment to the child." (*Ibid*., quoting *Adoption of Kelsey S.* (1992) 1 Cal.4th 816, 849 ["If an unwed father promptly comes forward and demonstrates a full commitment to his parental responsibilities—emotional, financial, and otherwise—his federal constitutional right to due process prohibits the termination of his parental relationship absent a showing of his unfitness as a parent"]; see also *Adoption of Michael H.* (1995) 10 Cal.4th 1043, 1060 [biological father has no right to withhold consent to adoption "unless he shows that he promptly came forward and demonstrated as full a commitment to his parental responsibilities as the biological mother allowed and the circumstances permitted within a short time after he learned or reasonably should have learned the biological mother was pregnant with his child"].)

Where an alleged father comes forth and expresses an interest in caring for the child at the earliest possible date, even when that desire is conditioned on the results of a paternity test, the alleged father should be given presumed father status and reunification services should be provided. (*In re Julie U.* (1998) 64 Cal.App.4th 532, 543-544.) However, in *In re Zacharia D., supra,* 6 Cal.4th at page 452, the Supreme Court found an alleged father's efforts insufficient to entitle him to reunification services when he did not come forward until the 18-month review, and then did so only because he believed that the mother would lose custody of the child. The court refused to toll the reunification period because the father was incarcerated and would be unable to visit with the child for six months, noting that the reunification period is expressly "not tolled by the parents' physical custody of the child, or by the parents' absence or incarceration. (§ 361.5, subds. (a), (d) & (e)(1).)" (*In re Zacharia D., supra,* at p. 452.)

Although Darryl is the biological father, the trial court did not err in refusing to grant him presumed father status because he did not promptly come forward to express an

interest in caring for her. He was represented by counsel at earlier hearings, but he did not announce an interest in being granted presumed father status until the January 19 hearing at which the court scheduled the termination hearing. There is some reference in the record to the possibility that Darryl previously sent his daughter a blanket or some clothing, but this gesture falls far short of the required demonstration of a commitment to parent the child. Darryl's assertion that he could not have come forward because of his hospitalization does not change the outcome. Through his attorney he could have expressed a desire to parent his daughter at a much earlier stage in the proceedings, if that were his intention.

Further, because the child was under three years of age when she was removed from the physical custody of her mother, reunification services may not be offered beyond six months unless there is a substantial probability that the child will be returned to the physical custody of the parents within 18 months. (Welf. & Inst. Code, § 361.5, subd. (a)(2).) The child has now been out of the custody of her mother for six months and the record reflects no substantial probability that she could or would be returned to Darryl's custody any time soon, given the projected length of his hospitalization and the apparent absence of any plan or ability on his part to care for his daughter once he is released. A report prepared on November 30, 2004, reflects that "Mr. H[.] is hoping to reunify with the child as soon as he is discharged from Napa State Hospital." However, in a report prepared on January 18, 2005, the social worker noted that Darryl had stated his intention to remain in a relationship with the mother after they were both released from the hospital, and asked if the foster family could care for the child until he was released. The social worker recorded her concern "that these parents appear to put their needs before [their daughter's] needs. . . . The idea that Mr. H[.] would be prepared to care for an infant upon their release from Napa State Hospital is difficult to imagine to say the least, something like that would take time and require intensive preparation given that he has never parented a child and has spent the majority of the last 9 years in state mental facilities."

Because we conclude the court did not err in denying Darryl presumed father status, it follows that he had no right to reunification services and therefore no right to have his daughter placed with him even if such a placement were possible, which it is not. There was substantial evidence to support the juvenile court decision to deny reunification services and set the matter for a hearing under section 366.26.

Disposition

The petition for extraordinary relief is denied on the merits. (See Cal. Const., art. VI, § 14; *Kowis v. Howard* (1992) 3 Cal.4th 888, 894.) Since the permanency planning hearing is set for May 11, 2005, our decision is immediately final as to this court. (Cal. Rules of Court, rule 24(b).)

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Pollak, J.

We concur:

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McGuiness, P. J.

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Corrigan, J.